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In The

Supreme Court of the United States

JEFFREY KITTKA,

Petitioner,

v.

MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

REPLY BRIEF FOR PETITIONER

CHRISTOPHER J. MCGRATH
Counsel of Record
42705 Grand River Avenue
Suite 201
Novi, Michigan 48375-1727
(248) 374-1822

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONER

1. The State maintains that certiorari review is unwarranted because "the highest court in Michigan, the Michigan Supreme Court, did not address Petitioner's *Blakely*[1] issue." BIO 5. The opinion of the Michigan Court of Appeals became the judgment of the highest state court when the Michigan Supreme Court denied discretionary review. In *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954), two natural gas pipeline companies obtained judgments against officials from the State of Texas. The judgments were reversed by the Texas Court of Civil Appeals. After unsuccessfully applying for discretionary review before the Supreme Court of Texas, the companies sought certiorari in this Court. Instead of identifying one judgment, the companies appealed the decisions of both state appellate courts. This Court dismissed the appeals from the Supreme Court of Texas, and reviewed the appeals from the Court of Civil Appeals decision. *Id.*, at 160. Like the Supreme Court of Texas in *Calvert*, the Michigan Supreme Court has discretionary jurisdiction to hear cases. It was necessary for Petitioner to seek review in the Michigan Supreme Court, but the fact that discretionary review was denied is not a valid reason for this Court to deny review.

The State's contention that Petitioner's untimely motion to remand did not preserve the question

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[1] *Blakely* v. *Washington*, 542 U.S. 296 (2004).

presented for review (BIO 6) is incorrect. Michigan appellate courts do not strictly enforce the timeliness requirement for motions to remand. For example, in *People* v. *LaPlaunt*, 552 N.W. 2d 692 (Mich. Ct. App. 1996), the defendant's attorney "could have" and "should have" filed a timely motion to remand after learning of a key witness's recantation. *Id.*, at 693. Nevertheless, the Michigan Court of Appeals granted the defendant's untimely motion and remanded for a hearing on whether he should be afforded a new trial. And in *People* v. *Mayes*, 446 N.W. 2d 481 (Mich. 1989), the Michigan Supreme Court reversed an order of the Michigan Court of Appeals denying the defendant's motion to remand for a hearing on whether he received ineffective assistance of counsel. The Michigan Supreme Court acknowledged that the motion had not been timely filed in the Court of Appeals, but determined that appellate review would best be carried out by permitting the record to be developed in the trial court.

More recently, in *People* v. *Drake*, Mich. Ct. App. No. 269103, 2007 WL 1227752 (unpublished), the defendant sought to preserve a challenge to the scoring of his sentencing guidelines by filing a motion to remand, but the motion was filed out of time. The Michigan Court of Appeals opined that an untimely motion to remand is "arguably" improper. However, the Court of Appeals still reviewed the merits of the defendant's scoring challenge. *Id.*, at *3.

"State courts may not avoid deciding federal issues by invoking procedural rules that they do not

apply evenhandedly to all similar claims." *Hathorn* v. *Lavorn*, 457 U.S. 255, 263 (1982). The filing of an untimely motion to remand in the Michigan Court of Appeals does not consistently result in forfeiture of the underlying issue. Accordingly, certiorari review of Petitioner's federal claim should not be precluded by the fact that his motion to remand was filed after the deadline set forth in Mich. Ct. R. 7.211(C)(1)(a).

2. Michigan limits judicial discretion in felony sentencing by requiring courts to adhere to the appropriate statutory guidelines range. Mich. Comp. Laws §769.34(2) (West 2006). When the upper limit of an offender's guidelines range is 18 months or less, a court must impose an intermediate sanction. Mich. Comp. Laws §769.34(4)(a). An intermediate sanction may include a fixed term which does not exceed 12 months. *Id.* In this case, before the 25-point assessment under OV-13, the upper limit of Petitioner's guidelines range was less than 18 months. Had the trial court not found that Petitioner committed multiple crimes against a person, it could not have required him to serve even a day more than 12 months in a county jail.

The State argues that the trial court did not impose sentence in a manner contrary to the Sixth Amendment because the court only employed judicial fact-finding in order to compute Petitioner's "'minimum sentence range." BIO 8-9. The upper limit of a Michigan offender's guidelines range triggers a 12-month statutory maximum when it is at or below the

18-month threshold. The *Apprendi*[2] line of cases clearly establishes that the term "statutory maximum" refers to "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S., at 303 (emphasis omitted). It may be true that Mich. Comp. Laws §769.34(4)(a) makes the upper limit of the "recommended minimum sentence range" the benchmark for determining whether an offender is entitled to an intermediate sanction. A judge effectively assumes the role of a juror, however, when he or she finds aggravating circumstances which expose an offender – who is otherwise assured of a flat jail term – to a variable term of imprisonment.

There is no legal significance in the fact that a minimum sentence cannot be calculated without examining an offender's OV score. In the state's view, a defendant does not even become eligible for the 12-month limitation until after the OVs have been scored. BIO 11. In essence, the State is suggesting that the OVs serve as a mitigating mechanism. Mitigation through the use of judicial fact-finding does not appear to implicate Sixth Amendment concerns. And certain jurisdictions do call for high mandatory sentences, while permitting judges to depart downward based on the presence of mitigating factors. See, *e.g.*, *State* v. *Haught*, 624 S.E. 2d 899 (W. Va. 2005). But Michigan

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[2] *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

is not one of them. A Michigan judge may not ignore the intermediate sanction requirement by refusing to score an offender's OVs. See Mich. Comp. Laws §769.34(2) (providing that the sentencing guidelines are mandatory). The guidelines require judges to start at the bottom and work their way up. An offender's initial OV score is zero. When aggravating circumstances are found, the offender's score increases accordingly. Michigan courts lack the discretion to sentence up to the absolute statutory maximum before the OVs have been scored. The imposition of an intermediate sanction when a guidelines score requires it is not an act of judicial leniency.

The State claims that previous decisions of this Court upholding mandatory minimum sentences should dictate the outcome of this case. BIO 14-16. In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), this Court upheld a law which required a mandatory minimum sentence of 5 years upon the finding that an individual "visibly possessed" a firearm during the commission of an enumerated offense. The provision did not "authorize a sentence in excess of that otherwise allowed." *Id.*, at 82. Similarly, in *Harris* v. *United States*, 536 U.S. 545 (2002), this Court refused to reverse a mandatory 7-year term triggered by the finding that the defendant "brandished" a firearm in relation to a drug trafficking crime. The trial judge in *Harris* was permitted to impose a sentence "well in excess" of the 7-year minimum even if the firearm had not been brandished. *Id.*, at 554. The common denominator in *McMillan* and *Harris* – and the factor that distinguishes them from this case – is each

sentencing judge could have imposed the very same term of imprisonment without finding that a weapon was displayed. Here, on the other hand, the trial court did not have the authority to send Petitioner to prison without finding that he committed multiple crimes against a person. The intermediate sanction requirement functions as a statutory maximum because it imposes a ceiling, not a floor, on the amount of time an offender may be required to serve.

3. The question presented is important and has divided the Michigan courts. The jury's verdict restricted the trial court's authority to impose any term in excess of 12 months in a county jail. The trial court was only permitted to imprison Petitioner for a term of 18 months to 15 years after considering facts rejected by the jury. Five Michigan Supreme Court justices have concluded that there is nothing wrong with this type of fact-finding, but two others have determined that the Sixth Amendment prohibits it. *People* v. *McCuller*, 739 N.W. 2d 563 (Mich. 2007) (after remand). Three Michigan Court of Appeals judges have held that, when a defendant is eligible for an intermediate sanction, the Sixth Amendment does not permit the use of facts found by a judge to support the conclusion that a substantial and compelling reason for a departure exists. *People* v. *Uphaus*, 737 N.W. 2d 519 (Mich. Ct. App. 2007), rev'd 741 N.W. 2d 21 (Mich. 2007). This Court should end the controversy over whether the Sixth Amendment applies to the Michigan sentencing system.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER J. MCGRATH
Counsel of Record
42705 Grand River Avenue
Suite 201
Novi, Michigan 48375-1727
(248) 374-1822